United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2078

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES, *ex rel.* STEPHEN P. SAPIENZA,
Petitioner, on behalf of ALFRED A. ARGENTINE,

Relator-Appellant,

against

LEON J. VINCENT, Warden, Green Haven Correctional Facility,

Respondent-Appellee.

On Appeal from the United States District Court for the Eastern District of New York

---

BRIEF FOR RELATOR-APPELLANT

REISCH, KLAR & LANE, P. C.,
Attorneys for Relator-Appellant,
1501 Franklin Avenue,
Mineola, N. Y. 11501

BURTON C. AGATA,
Of Counsel and on the Brief.

TABLE OF CONTENTS

Cases Cited Page

Authorities Cited

Page

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 75-2078

UNITED STATES ex rel. STEPHEN P. SAPIENZA,

Petitioner on behalf of

ALFRED A. ARGENTINE,

Relator-Appellant,

-against-

LEON J. VINCENT, Warden, Green Haven Correctional Facility,

Respondent-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR RELATOR-APPELLANT ALFRED A. ARGENTINE

Alfred A. Argentine appeals from a judgment entered against him denying a hearing and dismissing his petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York on April 4, 1975, rendered by the Honorable Orrin G. Judd. On May 5, Judge Judd certified that probable cause exists to support an appeal to the United States Court of Appeals.

ISSUES PRESENTED FOR REVIEW

1. Whether the State Court's denial of Argentine's demand that he be permitted to present himself in his criminal trial in the State Court violated his rights under the Fourteenth Amendment to the Constitution of the United States.

2. Whether Argentine was denied or did not have effective defense counsel in his criminal trial in the State Court by virtue of the total absence and loss of confidence by Argentine in his assigned counsel, the assigned counsel's repeated requests to be relieved and counsel's active opposition to Argentine's applications (i) for change of venue and (ii) that certain witnesses be compelled to appear and testify in his defense.

3. Whether a hearing should have been held to determine if Argentine was subjected to the possibility of an unfair trial by virtue of prejudicial pre-trial publicity.

4. Whether the State Court denied Argentine his Constitutional right to compel the attendance of witnesses under circumstances where the credibility of witnesses and the inference to be drawn from circumstantial evidence went to the core of the prosecution's case.

5. Whether Argentine was denied the right to confront witnesses and was the victim of a failure to reveal or suppress evidence material to his defense by virtue of the trial court's reliance on hearsay in deciding his right to an adjournment in order to obtain retained counsel and the failure to reveal an alias and past records of witnesses at the trial.

STATEMENT OF FACTS

The Proceedings Below

In the proceedings below, there were several pleadings and exhibits which it is important to identify in order to determine precisely which matters were denied and which were not. The significant pleadings are Argentine's Amended Petition (4a-70a), Second Amended Petition (95a-134a) and the State's Affidavit (71a) and Supplemental Affidavit (84a) in opposition. The affidavits in opposition were prepared in response to the Amended Petition. The response to the Second Amended Petition was a letter of February 20, 1975 (135a). Also, See Response of Argentine's Attorney, March 6, 1975 (136a). There were also several exhibits* before the Court which will be referred to during the course of the brief.

The foregoing is set out because, there having been no direct response to each of the allegations in the Second Amended Petition, there is some difficulty in determining what is in issue. However, in the course of this brief, the Appellant has assumed that the facts denied in response to the Amended Petition were deemed denied with respect to the Second Amended Petition and further that both the Court and the Respondent relied on the matter (particularly the exhibits) in both petitions.

---

* These include a transcript of the trial, Supplemental Index aa, hereinafter referred to as Tr. p. , and a transcript of a coram nobis proceeding, supplemental Index bb, hereinafter referred to as Cor. Nob. p. .

The State Court Proceedings

In this petition for a writ of federal habeas corpus, Argentine attacks a New York State conviction for forgery (2 counts) and grand larceny.

The procedural background in the State Courts is fairly complex. In addition to the trial which resulted in the conviction under attack in this proceeding, there was an abortive appeal, a habeas corpus proceeding and two coram nobis proceedings. Furthermore, there were other indictments pending at the time the indictment at issue in this proceeding was returned and they have some bearing on this federal habeas corpus petition.

(1) Trial and Pre-Trial in State Courts

The facts sought to be proved by the prosecution in Argentine's state trial are relatively simple. In support of Nassau County Indictment No. 19147 of October 1, 1963, charging Argentine with two counts of forgery and one of grand larceny, the prosecution's case was directed at proving that Argentine gave a check in the amount of $356.91 to a travel agency in exchange for three airline tickets from New York to Florida. Argentine allegedly forged the drawer's signature (Horton) before entering the travel agency store and filled in the name of the payee and the amount of the check in front of a travel agency clerk (Wartenberg).

The check was returned for insufficient funds, but in the meantime Argentine allegedly had used the tickets and gone to Florida with a woman. Argentine never testified nor was any evidence presented by him. The trial of Indictment No. 19147 began on January 20, 1964, and ended with a guilty verdict on the aforesaid three counts on January 28, 1964. He was sentenced as a second felony offender to concurrent sentences of two to ten years on the first count, ten to twenty years on the second count and two and one-half years to ten years on the third count.

Contemporaneous with or prior to Indictment No. 19147, the one involved in this proceeding, other indictments against Argentine were filed. One of these indictments was Indictment No. 18690.

On December 16, 1963, Indictment No. 18690 came on for trial before Judge Aaron Goldstein in the County Court in Nassau County. The appointed counsel, James McDonough, Esq., appeared. Both he and Argentine sought to have him discharged and Argentine wanted him replaced by retained counsel. Judge Goldstein stated that he had made some telephone calls to determine if anyone would represent him, no one would and the application was denied. (Cor. Nob. 20-27). The trial on No. 18690 proceeded with Mr. McDonough as assigned counsel and ultimately ended in a mistrial (57a).

On December 16, 1963, the same day the events concerning No. 18690 took place, Mr. McDonough, who had been assigned to defend Argentine on Indictment No. 19147, the indictment involved in this proceeding, applied with Argentine to be relieved on No. 19147. This application was denied (Second Am. Pet. 3(c), 99a, undenied allegation).

Indictment No. 19147 came on for trial on January 6, 1964, before County Court Judge Paul Kelly in Nassau County. Argentine again asked that McDonough be relieved and that an adjournment be granted to permit him to be represented by a Mr. Winters. Mr. McDonough, who had previously asked to be relieved, repeated his request on January 6, stating that the doubted that he could effectively represent Argentine because of their deteriorated relationship. Judge Kelly denied the application. It should be noted that this was the first time an adjournment on the trial of No. 19147 had been requested. Furthermore, only one other attorney had ever appeared for Argentine on this indictment. This was a Mr. Kutner, who had appeared solely to make an application for bail. (99a, 105-6a, Tr. p. 4)

The trial which began on January 6, 1964, ended in a mistrial on January 7, 1964, because of prejudicial pre-trial publicity (106a). At that time, Argentine was remanded pending a second trial, subject to a written motion to be made by Mr. McDonough for a change of venue (106a).

On January 20, 1964, Indictment No. 19147 came on for a second trial. Before the jury was selected, Argentine moved for several forms of relief (Tr. 2-10):

(i) a change of venue on the grounds that the pre-trial publicity had continued and the prejudicial effects of the earlier publicity had not been dissipated. Mr. McDonough refused to make or support this motion and, in fact, he stated his doubts that there were adequate grounds (Tr. 5-6). The application was denied by Judge Kelly on the grounds that the motion was in the wrong forum and also on the merits (Tr. 10).

(ii) an application that Mr. McDonough be relieved and for an adjournment to permit Mr. Winters, whom Argentine stated was his retained counsel, to represent him. Mr. McDonough also asked to be relieved. These requests were denied. Judge Kelly's denial was based in substantial part on some out-of-court statements by Judge Goldstein concerning Indictment No. 18690. Judge Kelly apparently believed that Judge Goldstein's statements dealt with Indictment No. 19147. Apparently, Judge Goldstein had alluded to the appearance, discharge and the refusal to continue by a number of attorneys in connection with the earlier and separate indictment, Indictment No. 18690 (Tr. 3,18a).

Judge Gibbons, in denying Argentine relief in the later 1969-71 Corm Nobis proceeding stated that Mr. Winters would have been "the ninth attorney on the list to enter the scene to conduct the defense of the case on his behalf" (emphasis supplied) (57a-58a). However, the other attorneys were not involved in this case at all, but in Indictment No. 18690 (Aff. Opp. 79-80a). Judge Gibbons also found that there was no likelihood that Argentine could afford retained counsel and that Mr. Winters had not been retained (58a).

(iii) a request that Argentine be permitted to proceed pro se, if he had to proceed at that time. The facts are in dispute on this point.

In his opinion denying Coram Nobis relief without a hearing in 1969, Judge Kelly, who had presided over the trial, stated that Argentine had requested that he be permitted to proceed pro se "on the eve of trial" (51a). Judge Gibbons, after the hearing in that proceeding, found that no request had been made at that time (58a), but he did not address directly the statement by Judge Kelly.

Judge Judd, in his opinion below, stated (139-40a):

> "The second trial began on January 20, 1964. Before the selection of the jury, Mr. McDonough asked again to be relieved because the defendant refused to discuss the facts with him, and Argentine asked leave to proceed pro se."

A fair statement of the facts should note that the trial minutes do not re ord such a request, but Argentine persistently and consistently has claimed the minutes were inaccurate (See 72a, 96a).

"Additional motions to relieve Mr. McDonough and let Argentine proceed pro se were denied in the course of the trial" (opinion per Judd, J., 140a).

The trial proceeded, and on January 27, 1964, after the prosecution rested (Tr. 291, 317), Argentine again requested that he be permitted to present his own defense and proceed pro se. He also requested that certain witnesses be subpoenaed, but Mr. McDonough opposed Argentine's position, stating he had doubts about the admissibility or helpfulness of their testimony (Tr. 318 et seq., 291 et seq.). The requests were denied. The issue concerning compelling the appearance of witnesses was held by Judge Altimari in the 1973 Coram Nobis proceeding to be non-reviewable at that time and one which should have been part of Argentine's direct appeal (33a-39a). The facts concerning these requests for witnesses are set forth below at p. infra.

Defendant was convicted on all counts on January 28, 1964. On March 13, 1964, when defendant appeared for sentencing and to determine his prior felony offender status, Mr. McDonough finally was relieved and defendant permitted to proceed pro se with the assistance of Donald Goldman, Esq., as assigned counsel (101a).

Review Process in the State Courts

(i) Direct Appeal

Argentine served a timely notice of appeal to the Appellate Division of the Supreme Court of the State of New York, Second Department, on March 18, 1964. He proceeded pro se and as a poor person. He made numerous efforts in the form of motions and otherwise to obtain corrections of what he alleged were errors in the trial transcript. His contentions concerning these alleged errors were rejected but Argentine persisted and, on October 3, 1966, the court dismissed his appeal on its own motion for failure to prosecute. Leave to appeal from this order of dismissal was denied by the Court of Appeals on October 16, 1967 (96a).

(ii) Coram Nobis and Habeas Corpus in State Court

(a) 1969 Habeas Corpus

On June 9, 1969, Argentine petitioned for a State Writ of Habeas Corpus. Hearings were held before the Honorable Judge John S. Conable in Wyoming County, New York. The Petition therein alleged perjured testimony by a state witness, prejudicial pre-trial publicity, denial of the right to proceed pro se, denial of compulsory process to obtain witnesses and denial

of a change of venue, all in violation of defendant's rights. The hearings were completed on or about April 13, 1970, and the Court reserved decision. To date, there has been no decision forthcoming (97-98a, 147a-148a).

(b) 1969-71 Coram Nobis

Argentine moved for a Writ of Error Coram Nobis in Nassau County, claiming that he was denied the right to counsel of his own choosing and the right to proceed pro se. This Writ was heard by Judge Kelly, the judge who presided over the trial. Judge Kelly, with an accompanying opinion in which he stated that Argentine had asked to proceed pro se "on the eve of trial", denied the Writ without a hearing on December 31, 1969. On October 9, 1970, the Appellate Division, Second Department reversed the decision of Judge Kelly and remanded the Petition to the County Court for a hearing (96a-97a) A hearing was held before the Honorable David T. Gibbons, a Judge of the County Court, Nassau County, who denied the petition on July 21, 1971. (Judge Gibbons' opinion is at 54a) No appeal was taken by the defendant from this decision. The record of the hearing before Judge Gibbons is before this Court as an Exhibit (Exhibit bb).

(c) 1973 Coram Nobis

In or about October, 1973, Argentine petitioned for a Writ of Error Coram Nobis in the County Court, Nassau County. It was denied on October 10, 1973. Reargument was granted and the denial adhered to on November 16, 1973, and leave to appeal to the Appellate Division was denied on January 31, 1974. No further relief is available. In this 1973 application, Argentine alleged that an important prosecution witness gave false material testimony and that this was known to the prosecution, that newly discovered evidence uncovered since the trial, if available and introduced at the trial, probably would have changed the result and that Argentine had improperly been denied the right to subpoena and call witnesses in his defense (97a; 33a-39a).

FACTS RELATING TO DENIAL OF COMPULSORY PROCESS

As previously stated, on January 27, 1964, Argentine had requested that certain witnesses be subpoenaed and that he be permitted to present his defense pro se. A days's adjournment was granted to obtain one of the witnesses. On January 28, Argentine asked the court to issue subpoenas. Mr. McDonough cast doubt upon the merits of the application in terms of the utility of the projected testimony, its possibility of harmfulness to the defense and its admissibility (Tr. 318). The application was denied. The facts concerning these witnesses are set out at pages 11-14 of Argentine's Second Amended Petition (110a-113a) and to set them out again would unduly lenghthen the brief. Their non-repetition here is not intended to diminish the importance of the point for Argentine. The Court's attention also is invited to Judge Judd's conclusions concerning this point (Op. Judd, J. 159a).

ARGUMENT

POINT I.

ARGENTINE WAS DENIED HIS CONSTITUTIONAL RIGHT UNDER THE FOURTEENTH AND SIXTH AMENDMENTS TO REPRESENT HIMSELF

Right invoked prior to trial

This Circuit has long recognized the constitutional right of a defendant to represent himself in a state criminal proceeding. United States ex rel. Maldonado v. Denno, 348 F.2d 12 (2d Cir.1965), cert. den. 384 U.S. 1007 (1966). Recently, the Supreme Court of the United States in Faretta v. California, U.S. ,43 LW 5004(1975), affirmed the defendant's right to proceed pro se.

In Maldonado, supra, at 15, the Court stated that "[t]he right of a defendant in a criminal case to act as his own lawyer is unqualified if invoked prior to the start of the trial." There is some dispute in the case at bar as to when Argentine first requested to proceed pro se. If the facts as stated by Judge Kelly ("on the eve of trial") (51a) and by Judge Judd ("[b]efore the selection of a jury") (139-40a) and as claimed by Argentine are accepted, then the demand was made before trial. In fact, Argentine's demand would have been made at the same time Maldonado made his demand, i.e., "after ...[the case] had been called on the calendar but before the jury had been chosen." Maldonado, supra, at 16.

Hence, Argentine thereby would have been denied his "unqualified right" to represent himself and he would be entitled to habeas corpus relief in this proceeding. Indeed, Judge Judd's finding that the demand was made before trial requires reversal and remand to grant the petition.

The problem in this case is twofold:

(1) Was the request to proceed pro se made before trial? (2) If it is concluded that the request was made after the trial began, was it improperly denied?

Was the request made before trial?

Here, it must be decided whether to accept the versions of Kelly, Judd and Argentine that the request was made before trial, or that of Judge Gibbons (58a) in the 196971 Coram Nobis proceeding, that the request was not made until after the prosecution rested. If the Kelly-Judd view is accepted, relief should be granted automatically under Faretta and Maldonado, supra. If the Gibbons view, then an issue of whether his request was properly denied still remains.

It is submitted that the statement of the trial judge (Judge Kelly), albeit in an opinion in a later Coram Nobis proceeding, (p. 11, supra), should be given great weight and when combined with the statement by Judge Judd, who had all the papers submitted by both parties to this proceeding before him,

requires either a finding that Argentine made a timely request to invoke the unqualified right of the Maldonado rule or, at least, that a hearing before the federal court be held to determine the issue. This position is particularly compelling when it is realized that Judge Gibbons relied upon the trial record and Argentine has always claimed the minutes of the trial were incomplete and inaccurate, a position borne out, at least on this issue, by Judge Kelly's statement.

Right Invoked After Trial Has Begun

If it is found that Argentine did not make the demand prior to jury selection, but made it after the trial had begun; indeed, that he made it after the prosecution rested, but before the defense had begun, Maldonado, supra, at 15, provides a different test:

> Once the trial has begun with defendant represented by counsel, however, his right thereafter to discharge his lawyer and to represent himself is sharply curtailed. There must be a showing that the prejudice to the legitimate interests of the defendant overbalances the potential dispruption of the proceedings already in progress, with considerable weight being given to the trial judge's assessment of this balance.

The foregoing standard raises two issues:

(1) Is this a proper standard?

(2) If it is, was it properly applied in this case to deny Argentine's request that he be permitted to defend himself?

Addressing the second issue first, it is submitted that Argentine should have been permitted to proceed pro se even if his first clear request is deemed to have been made after the prosecution rested. Even under the Maldonado rule, the trial judge's discretion to deny leave to proceed pro se is not unbridled; it must be exercised by weighing two factors: the legitimate interests of the defendant against the potential disruption of the proceedings.

Examining the factors involved in the two competing interests, "prejudice to the defendant's legitimate interests", and "potential disruption of the proceedings", the following appears:

(a) There was no confidence in counsel from the outset and this was manifested prior to and throughout the trial by counsel's and Argentine's repeated requests that counsel be relieved (See pp. 26 et seq., infra).

(b) Counsel repeatedly opposed Argentine's view of the case and this was most explicitly revealed by Mr. McDonough's opposition to or stating reasons why two of Argentine's key requests, change of venue and subpoena of certain witnesses, should not be granted. (Tr. 5-6, 10, 13-18 et seq., 291 et seq.).

Both factors which Maldonado states supports the right to proceed pro se, lack of confidence in counsel and assertion of individual autonomy, were present in this case. Maldonado, supra, at 15.

In the 1971 Coram Nobis hearing, Mr. McDonough candidly related the total breakdown of their relationship:

> McDonough: "Well, I would say that most every day during the trial Mr. Argentine requested that I be discharged as his attorney, and I might add that I aquiesced every day, every time it came up, but I was not relieved." (Cor. Nob. 30)

At the very outset of the trial, after prior motions to be relieved were denied, Mr. McDonough reminded the Court that in the prior trial, Argentine had asked that McDonough be relieved and that the breakdown in their relationship resulted in McDonough's coming to Court on that day "with very little preparation." (Tr. 4). In fairness to Mr. McDonough, at that point, Mr. Argentine refused to speak to him, but that does not detract but rather reinforces the contention that Argentine had no confidence in Mr. McDonough's potential for putting on

a defense. This lack of confidence was not fanciful, if the uncontradicted allegations in the Second Amended Petition are exam ed. On October 29, when Mr. McDonough first visited Argentine, he was told that his services were not wanted. This occured after Mr. McDonough appeared unmoved after being told of an alleged beating Argentine suffered in the County jail (104a). On December 14, Mr. McDonough met Argentine and complained of Argentine's retaining a Mr. Kutner to make a bail application. He also advised him to take a plea without having done any preliminary investigation or research into the case (105a). The advice was based on McDonough's belief that such a plea would be beneficial in view of other charges (105a), but nevertheless, it meant that Argentine, who wanted to put up a defense, would have no confidence in his assigned counsel's willingness to do so. Requests to be relieved on the basis of total breakdown and other references to failure to cooperate were made during the trial (Tr. 291, 227-29).

Mr. McDonough, at the Coram Nobis proceeding, stated that after he went to jail on two occasions and defendant would not speak to him, he decided, with Judge Kelly's acquiescence, not to go again. Thus, the Judge was aware of the breakdown and acquiesced in Mr. McDonough's plan not to confer with his client again (Cor. Nob. 31).

Further evidence of breakdown, in addition to the opposition to the change of venue and request for subpoena applications, is present in Judge Kelly's expression of sympathy for counsel (Tr. 19) and Mr. McDonough's facetious remarks concerning Argentine's motions. The motions were lengthy and at one point, Mr. McDonough makes the gratiutous observation (Tr. 207):

> Court: You have a motion, Mr. McDonough?
>
> Mr. McDonough: Yes, Your Honor. A one-page one. They are getting shorter. The defendant has asked me to read this to the Court.

In a real sense, the basis for affording a defendant the right to represent himself are dramatized in Argentine's case.

> The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant--not an organ of the State interposed between an unwilling defendant and his right to defend personally. To thrust counsel upon the accused against his considered wish thus violates the logic of the Amendment. .. An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal function. Faretta, supra, U.S. , 43 LW at 5008.
>
> * * *
>
> The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of conviction. Id. 43 LW at 5012.

Here, surely counsel was not wanted by the defendant and defendant has borne "the personal consequences of conviction"--a sentence of 10-20 years.

While defendant's real and legitimate interests are patent here, there remains the second prong of the Maldonado rule: avoiding disruption of ongoing proceedings. This cannot mean that anytime the request to defend one's self is made after the trial commences, the mere granting of the request is equivalent to disrupting the proceedings. Rather, the factors concerning disruption must be examined. Otherwise, there would not be even that "sharply curtailed" right recognized in Maldonado, supra, at 15; there would be no right at all.

In this case, even if the first request to proceed pro se was made after the prosecution rested, it was made before the defense was to begin--a logical and normal shifting of gears in any criminal case, and peculiarly appropriate here. Mr. McDonough supported Argentine's application. Argentine's lack of confidence in Mr. McDonough was no surprise to anyone. Further, his reasons for lack of confidence had been reinforced. Argentine had had the opportunity to see how assigned counsel would handle the case and what he saw was totally at odds with his view of his own case. This, then, was the propitious time to ask the Court to permit Argentine to represent himself.

What then was the disruptive element? There was no request that the trial be delayed solely because Argentine wanted to proceed pro se and prepare his defense. If such a request had been made, Maldonado, supra, at 16, in its directions as to what may be done even if the absolute right to proceed pro se is asserted prior to trial points the way for the trial judge. The Judge could have "insist[ed] that [Argentine] proceed to trial at once." Here, the Judge made no inquiry as to whether delay would result or even if Argentine wanted a delay for that purpose. It appears that the mere granting of Argentine's request was deemed to constitute disruption. Indeed, the trial judge, in the midst of the prosecution, evidenced a belief that proceeding pro se even at that point would not disrupt the ongoing proceeding, when it told defendant he had a right under the law, even then, to represent himself (Tr. 229). It appears that in denying Argentine's request at the end of the prosecution's case, the trial judge did not even balance interests, he merely decided. Interestingly, at the same time the Court did grant a short adjournment to permit counsel to find a witness (Tr. 311). Presumably, delay at this point was not considered disruptive.

No reason at all appears why Argentine should not have been permitted to defend himself and there are many reasons why he should have been afforded this right. Under the circumstances of this case, the defendant's "legitimate interests" were so "prejudice[d]"as to "[overbalance] the potential disruption of proceedings already in progress." Maldonado, supra, at 15. Therefore, the judgment below should be reversed and Argentine's petition should be granted because he was unconstitutionally denied his right to represent himself.

(3) Constitutionality of Maldonado Restriction on Invoking Right After Trial Begins

In Faretta v. California, supra, U.S. , 45 LW 5004, (1975), in which the Supreme Court recognized a constitutional right to defend one's self, the question of when the right must be asserted was left open. Thus, the question, "Must he be allowed to switch in midtrial?", remains to be resolved by the Court. Faretta, supra, 45 LW at 5018 (Blackmun, J., dissent). The denial of the right to change to pro se representation during trial has been criticized. Note, The Right of An Accused to Proceed Without Counsel, 49 Minn. L. Rev.1133, 1137 (1965); Note, Criminal Procedure--Right to Defend Pro Se, 48 N.C.L.Rev. 678 (1970).

Maldonado, supra, at 15, states that the right to proceed pro se is based on two policies: (1) that defendant is entitled to present "his best defense", and with a lawyer in which he has no confidence, "a defendant may be better off representing himself."; and (2) even if by defending himself he harms his cause, "respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice 'with eyes open'." Faretta, supra, is based on substantially similar considerations.

The two aforesaid interests to be served by a right to proceed pro se are present whether the election is made prior to or during trial. Conceding, arguendo, that there are "orderly administration of justice" interests to be served as well, the dichotomy of an "unqualified right" before trial begins and a "sharply curtailed right" thereafter undermines the interests to be served by recognizing the right in the first place. The mere exercise of the right during trial, by itself, raises no more threat of disruption to orderly proceedings -- the basis of the Maldonado rule -- than permitting defendant to represent himself if he elected to do so prior to trial. Further, whatever might motivate a defendant to represent himself if he so chooses prior to trial, is no more or less improper than when the same motives impel his choice during trial. Where there is disruption, even if it consists of delay to prepare, the court can and should

deal specifically and narrowly with the disruptive element in the specific case, but it can and should do this whenever the right is invoked. No general rule of a "sharply curtailed" right to proceed pro se is necessary and such a general rule is at odds with the basic right of self-representation itself.

As applied to this case, there is no evidence that the orderliness of the proceedings would have been disrupted merely by granting Argentine the right to proceed pro se. Hence, it appears that (i) the trial court violated the rule as stated in Maldonado, because as previously noted, there was no balancing of interests, (ii) as applied, the denial was an unconstitutional application of the rule and (iii) if the denial was in accord with the Maldonado standard, that standard is unconstitutional.

Any other view "imparts to the right to defend pro se an evanescent quality not entirely consistent with the actual and alleged constitutional underpinnings of the right, nor with notions of individual autonomy." Note, supra, 48 N.C.L. Rev. 678, 687 (1970). On this ground alone, Argentine's petition should be granted.

POINT II.

REQUIRING ARGENTINE TO UNDERGO A TRIAL WITH COUNSEL WITH WHOM HE HAD IRRECONCILABLE CONFLICT AND WHO ACTIVELY OPPOSED THE MERITS OF HIS POSITIONS DEPRIVED HIM OF EFFECTIVE ASSISTANCE OF ANY COUNSEL WHATSOEVER IN VIOLATION OF THE SIXTH AND THE FOURTEENTH AMENDMENTS.

This Circuit appears to have recognized that "to force a defendant to 'undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict deprives him of the effective assistance of any counsel whatsoever.'" United States v. Morrissey, 461 F.2d 666, 670 (2d Cir.1972), citing Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970). The facts of this case amply demonstrate that "irreconcilable conflict" is the most apt description of the relationship between Mr. McDonough, the assigned counsel, and Argentine. The facts include not only Mr. McDonough's and Argentine's consistent and persistent efforts to bring this state of affairs to the Trial Judge's attention, but that Judge's recognition of the situation. However, instead of making 'searching inquiries' before the trial commenced, (Morrissey, supra, at 670), the trial judge sanctioned Mr. McDonough's refusal and failure to confer with

Argentine after the first two conferences failed. (Cor. Nob. 31).

Of course, it will be said that the fault is Argentine's -- he wouldn't speak to counsel. The response is simple. First, the fact that Argentine's dissatisfaction with Mr. McDonough resulted in forcing him to go to trial represented by counsel "with whom he would not cooperate" and even if he "would not, in any manner whatsoever, communicate" with him, is not a reason for rejecting Argentine's position, but rather, supports his complaint that he did not have effective assistance of counsel within the Morrissey, supra, and Brown v. Craven rules. See, Brown v. Craven, 424 F.2d 1166, 1169 (9th Cir. 1970) for similar facts. Indeed, this situation required the trial judge to make inquiry into the cause of dissatisfaction or to take other steps that could lead to the appointment of counsel in whom Argentine's confidence would reside. Brown v. Craven, supra, at 1169; United States v. Morrissey, supra, at 670. In any event, it is not the law that "an uncooperative defendant waives his right to counsel." United States ex rel. Marcelin v. Mancusi, 462 F.2d 36, 47 (2d. Cir. 1972) (Kaufman, J., dissent), cert. den. 410 U.S. 917 (1973). However, the

decisive inquiry made by Judge Kelly was of Judge Goldstein, who related events concerning another Indictment, No. 16980 (Tr. 3). The merits of Judge Goldstein's perspective are not in issue here and also are not conceded, but surely Argentine had the right to a consideration of adequacy of counsel on Indictment No. 19147 as a totally separate matter.

Even before trial, Argentine had cause for his feelings of lack of confidence, even if Mr. McDonough's general competence is conceded. Argentine was ready to fight for his freedom; if convicted, he faced sentence as a second felony offender. At the very outset of their relationship, prior to any investigation of the charges by counsel, McDonough recommended that Argentine plead guilty, presumably under some plea bargaining arrangement. While such a suggestion is neither unusual nor necessarily bad practice, it did, in part, cause the lack of confidence in Mr. McDonough which is the issue here.

The course of the trial revealed the continued and sustained breakdown between attorney and client. In addition to the explicit revelation of the untenable situation to the Court by counsel and Argentine (Tr. 2,290-91, 316 et seq.), it was manifested at the trial, when Mr. McDonough, instead of acting as an advocate for the defendant, on

more than one occasion, acted as amicus curaie, at best. Thus, he not only refused to support an application for a change of venue, but expressed his belief that it should not be granted (Tr. 5-6). This was not a frivolous application. Only two weeks previously, a mistrial had been declared. At that time, the Judge was outraged at the offending newspaper and a motion for change of venue was begun by Mr. McDonough but postponed so that it could be in writing (19a, undenied allegations in Amended Petition). Argentine claimed that for a period of ten days after the January 7 mistrial, there was extensive prejudicial publicity (Id.). On January 20, the date of the second trial, not only did Mr. McDonough not make the motion, but he expressed his doubts about it (Tr. 5-6). He did not even aid Argentine to make it in what the court said would be proper forum--the Appellate Division (Tr. 10).

Mr. McDonough took a similar position with respect to the calling of witnesses. He argued reasons for denial (Tr. 314-24, 291 et seq.). Note also that throughout the trial, Argentine sought to have Mr. McDonough pursue avenues which he believed would aid his cause, and at one point suggested there was no reason for his, Argentine's, presence, because his views were consistently rejected by Mr. McDonough. (Id.). Cf. Brown v. Craven, supra, at 1169, in which Brown expressed feelings similar to Argentine's.

It might be argued that these decisions involved trial tactics over which Mr. McDonough should have the final say. First, that is not the issue at this point. These events serve to demonstrate conclusively the irreconcilable conflict between attorney and client and required inquiry or other action by the trial judge to assure effective counsel, which includes one with whom there is no irreconcilable conflict. Second, whatever might be said concerning the calling of witnesses as trial strategy, the same cannot be said about a change of venue. If the defendant has the absolute decision as to whether he should be tried with or without a jury, the factors which determine that decision include the potential of a prejudiced jury and the defendant's views should be paramount or at least carry great weight. In this case, Argentine's concern was neither frivolous nor untenable in view of the prior mistrial only two weeks earlier.

Third, and perhaps most important, Argentine was entitled to counsel who would present his contentions in their most favorable light. See, e.g., McCartney v. United States, 345 F.2d 471 (9th Cir. 1965). If counsel, for some reason, believed he could not do so, he surely should not have denigrated those positions. In an adversary proceeding, the defendant has sufficient opposition from the prosecution;

he should not have to be concerned about opposition from his own attorney. Further, even casting a more benign light on Mr. McDonough's opposition to Argentine's application, appointed counsel's function is not to act as amicus curiae, but he "must function in the active role of an advocate." (Entsminger v. Iowa, 386 U.S. 748, 751 (1967).

The case at Bar presents a classic situation of irreconcilable conflict between attorney and client. If the aid of counsel is required because of its potential impact on the result, how much more can the possibility of favorable impact be reduced than when counsel is not only out of tune with his client, but also actively opposes his requests.

> "It is questionable ... whether [counsel] should express a belief which is opposed to his client's welfare. The traditional duty of an advocate is that he honorably uphold the contentions of his client. He should not voluntarily undermine them." Harder v. State of California, 373 F 2d 839 (9th Cir. 1967).

Also, see, Instructions to Assigned Appellate Defense Counsel (103a).

Even if the irreconcilable conflict, at the outset, was not due to "fault" on Mr. McDonough's part (if fault be the standard), in his

affirmative conduct in opposition to his client, he was a pure volunteer.

By virtue of all the foregoing, Argentine did not have the "effective assistance of any counsel whatsoever" (Brown v. Craven, supra; Morrissey, supra) and his petition should have been granted.

POINT III.

THE DISTRICT COURT SHOULD HAVE GRANTED A HEARING ON THE ISSUE OF PREJUDICIAL PRE-TRIAL PUBLICITY

The Court, in its opinion below, states that there was no evidentiary support presented in the Second Amended Petition that prejudicial publicity continued to appear after January 7, 1964, the date a mistrial was declared (159a). It should be noted that this allegation was not denied by the State and the State's response to the Second Amended Petition, was, in effect, a response to the Amended Petition (135a). Cf. Response of Attorney (136a). The Amended Petition's Exhibit F (Doc. Page No. 5, Exhibit F of the Record) does contain newspaper clippings which were before the Court and allegations on this point in the Amended Petition were never denied. It is submitted that these undenied allegations of continuing and undissipated publicity in the context of a mistrial only 13 days before and the understanding that a motion for change of venue would be made provide a sufficient basis for a hearing on this issue (100a). It should also be noted that this issue has been before Judge Conable in Wyoming County. Argentine has been awaiting a decision for about five years and he will never have a decision on this point if

the federal court refuses a hearing (134a, 97a-98a; Opinion, Judd, J., at 147a-148a). See, e.g., United States ex rel. Silio v. Martin, 269 F.2d 586 (2d Cir. 1959); Near v. Cunningham, 313 F.2d 929, 934 (4th Cir. 1963).

POINT IV.

ARGENTINE WAS UNCONSTITUTIONALLY DENIED THE RIGHT TO COMPULSORY PROCESS FOR OBTAINING WITNESSES.

The right to have compulsory process for obtaining witnesses is a fundamental right guaranteed by the Sixth and Fourteenth Amendments. Washington v. Texas, 388 U. S. 14, 18-19 (1967). It is submitted that Argentine was improperly denied this right at his trial. Mr. McDonough's refusal to subpoena the witnesses does not bar Argentine from raising the issue because Argentine insisted on its exercise. The "choice made by counsel not participated in by petitioner does not automatically bar relief." Fay v. Noia, 372 U. S. 391, 439 (1962).

At the trial, the alleged victim of the forgery, one Horton, denied any business relationships with Argentine. If relationships could have been established, it would have cast serious doubt on whether there was any motive on

Argentine's part to forge Horton's check and whether Horton had a motive to lie concerning the alleged forgery. Argentine wanted to call a Miss Milo to establish this relationship. The refusal to permit Argentine to compel her attendance was a serious blow to his defense. The facts are more specifically stated at 107a-108a and in Exhibit A to the Second Amended Petition (121a).

A further blow to Argentine's defense occurred when he was refused the right to compel the attendance of one Dreiwitz, the manager of the travel agency which received the check. Only one person, the travel agency clerk, Wartenberg, testified to the "uttering" of the check (109a-110a). He described an office procedure which Dreiwitz could have rebutted (120a). Indeed, Wartenberg's testimony was crucial and the failure and refusal to compel Dreiwitz to testify left Wartenberg uncontradicted.

There were other witnesses who could have testified as to the plans concerning the alleged trip to Florida who also were not subpoenaed as alleged in the Second Amended Petition (108a-109a). There is a strong probability that the refusal to call these and the other witnesses (Tr. 310-329) contributed to Argentine's sense of futility and his ultimate decision not to testify. These witnesses dealt not with credibility alone but with the substantive issues in the case,

such as "uttering" and the taking and disposition of the alleged stolen property. They should not be passed off as "mere" credibility issues. The testimony would not have been scandalous, salacious or designed to harass the witnesses.

Further, in the context of Argentine's relationship with his counsel, it was particularly important that he be given the opportunity to call witnesses to present "his" defense. If the testimony bordered on the inadmissible, a ruling could be made at that time. Argentine was entitled to no less under the Sixth Amendment.

POINT V

ARGENTINE WAS UNCONSITUTIONALLY DENIED THE RIGHT OF CONFRONTATION AND, IN CONNECTION THEREWITH, MATERIAL EVIDENCE WAS SUPPRESSED.

A defendant has the right, under the Due Process Clause of the Constitution, to confront his accusers and this includes the effective right to cross-examine witnesses. See Chambers v. Mississippi, 410 U.S. 284 (1973); no extended discussion is required to establish this right. It is submitted that Argentine was denied this right in three respects. The details of this claim are set out in the Second Amended Petition and are only summarized here (110a-113a). First, he was never permitted to rebut Judge Goldstein's hearsay statements to Judge Kelly which

resulted in Argentine having to go to trial with an attorney he did not want and who did not want him (110a-111a). (Tr.3-4) Second, Horton, who was himself a forger and passer of bad checks had testified under the name Horton whereas he had also used and had been convicted of offenses under the name Lippens. This was never made known to the defense and Horton did not tell about it on the stand (Tr. 93-95); (111a0112a, 113a-115a). Also see Horton or Lippens "rap" sheet, Exhibit B to Second Amended Petition, (123a-126a) and Affidavit of Barron (Exhibit D, 130a-131a). While it has been argued that this would have been merely cumulative because Horton's character had been impeached by virtue of other testimony, Argentine had the right to bring out all of this information, particularly in view of its close relationship to the kind of conduct with which Argentine was charged. This could be viewed as a denial of confrontation or the failure to reveal evidence material to confrontation; however viewed, Argentine's defense was prejudiced thereby. This denial of his right is particularly significant when viewed in conjunction with the failure to call the witness who would have testified as to business relations between Argentine and Horton. The entire picture was never presented to the jury.

A further issue was presented to the court below in the claim that Wartenberg, the clerk, was later convicted of a theft offense and when he testified may have been under pressure from the prosecution (112a-113a).

It is submitted that under Chambers, supra. (right of confrontation and cross-examination) and Brady v. Maryland, 373 U.S. 83 (1963), relating to suppression of evidence, and its progeny, the record requires reversal and granting the petition or a hearing to determine the factual issues of suppression.

CONCLUSION

For the foregoing reasons the judgment dismissing the petition should be reversed with an order granting the petition or ordering a hearing.

Respectfully submitted,

Dated: July 30, 1975

REISCH, KLAR & LANE, P.C.*
Attorneys for Relator-Appellant
1501 Franklin Avenue
Mineola, New York 11501

Burton C. Agata
Of Counsel and
on the Brief

---

*We wish to acknowledge the assistance of Michael B. Kent, a third year law student at Hofstra University School of Law, in the preparation of this brief.

COPY OF THE WITHIN PAPER

RECEIVED

AUG 1 - 1975

NEW YORK CITY OFFICE

ATTORNEY GENERAL